

Exhibit 1

07:34 1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

4 WSOU INVESTMENTS, LLC *
5 DBA BRAZOS LICENSING * February 23, 2023
6 AND DEVELOPMENT *
7 VS. * CIVIL ACTION NOS.
8 DELL TECHNOLOGIES INC., * W-20-CV-480/481/486
9 DELL INC., EMC CORP *
10 AND VMWARE INC. *

11 BEFORE THE HONORABLE ALAN D ALBRIGHT
12 JURY TRIAL PROCEEDINGS
13 Volume 3 of 3

14 APPEARANCES:

15 For the Plaintiff: Jonathan K. Waldrop, Esq.
16 Marcus A. Barber, Esq.
17 John W. Downing, Esq.
18 Darcy L. Jones, Esq.
19 Heather S. Kim, Esq.
20 ThucMinh Nguyen, Esq.
21 Kasowitz Benson Torres, LLP
22 333 Twin Dolphin Drive, Suite 200
23 Redwood Shores, CA 94065

24 Hershy Stern, Esq.
25 Julianne Laporte, Esq.
1633 Broadway
17 New York, NY 10019

19 Paul G. Williams, Esq.
20 Kasowitz Benson Torres LLP
21 1349 West Peachtree Street, NW
22 Suite 1500
23 Atlanta, GA 30309

24 Gregory Phillip Love, Esq.
25 Steckler Wayne Cherry & Love PLLC
PO Box 948
Henderson, TX 75653

Mark D. Siegmund, Esq.
Melissa Samano Ruiz, Esq.
Steckler Wayne Cherry & Love, PLLC
8416 Old McGregor Road
Waco, TX 76712

4 For the Defendant: Brian Rosenthal, Esq.
5 Benjamin Hershkowitz, Esq.
6 Gibson, Dunn & Crutcher LLP
200 Park Ave.
New York, NY 10166

Jaysen S. Chung, Esq.
Y. Ernest Hsin, Esq.
Gibson Dunn & Cruthcher LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105

Veronica Smith Moye, Esq.
Gibson, Dunn & Crutcher LLP
2001 Ross Avenue, Suite 2100
Dallas, TX 75201

21 Proceedings recorded by mechanical stenography,
22 transcript produced by computer-aided transcription.

10:23 1 it is now apparently.

10:23 2 And my only point of telling you all this
10:23 3 is when this witness appears, he'll be sworn just like
10:23 4 the other witnesses that you'll have in this case. The
10:23 5 fact that he is appearing remotely should not impact
10:23 6 your opinion about his credibility, just like the
10:23 7 witnesses who are here in person or who might appear by
10:23 8 deposition.

10:23 9 You are the judges. You assess the
10:23 10 credibility one way or the other of anything that he
10:23 11 says. Take it into consideration. But don't -- he is
10:23 12 of equal dignity appearing by Zoom as he would be here
10:23 13 live.

10:23 14 So we'll take about a ten-minute recess.
10:24 15 We'll get the Zoom set up and then we'll go on with
10:24 16 that.

10:24 17 THE BAILIFF: All rise.

10:24 18 (Jury exited the courtroom.)

10:24 19 THE COURT: You may be seated.

10:24 20 Are you able, Mr. Rosenthal, while
10:24 21 they're setting up, to make your motions?

10:24 22 MR. ROSENTHAL: Yes, Your Honor.

10:24 23 THE COURT: Okay.

10:24 24 MR. ROSENTHAL: So, Your Honor, we are
10:24 25 going to file, if we haven't already, but we are going

10:24 1 to file, momentarily, a paper version of the motion.

10:24 2 The motion that we're making is a Rule 50(a) motion and

10:24 3 it will include a number of different bases.

10:24 4 But I want to focus any oral argument on

10:24 5 really one basis that I think makes this a little bit

10:24 6 of a different case than an ordinary case. And that is

10:25 7 that the plaintiff in this case has not put on any

10:25 8 evidence with respect to several critical limitations

10:25 9 of the singular claim that is at issue in this case.

10:25 10 So as the Court is well aware, we're

10:25 11 dealing with one apparatus claim, Claim 13, and that

10:25 12 apparatus claim -- and I'm happy to put it up on the

10:25 13 screen, although I think you remember it.

10:25 14 THE COURT: Yeah.

10:25 15 MR. ROSENTHAL: It has two and only two

10:25 16 structural elements. There is a processor module and

10:25 17 there is a switching module coupled to the processing

10:25 18 module. I think it's called a processor module. I

10:25 19 misspoke.

10:25 20 And as you know, we had a rough go of it

10:25 21 with the direct testimony, but we have very, very

10:25 22 carefully reviewed the transcript. We have searched

10:25 23 for the word "processor module." We have searched for

10:25 24 the word "switching module." We have searched for the

10:25 25 word "coupled" to make sure that we're not

10:25 1 misunderstanding what was said.

10:25 2 But because Dr. McClellan did not have
10:26 3 certain opinions and explanations in his report, the
10:26 4 Court correctly excluded any testimony about certain
10:26 5 things that --

10:26 6 THE COURT: I remember.

10:26 7 MR. ROSENTHAL: You remember. And so --
10:26 8 it's hard to forget.

10:26 9 So here's the things that are missing.

10:26 10 There was no testimony about what the processor module
10:26 11 is in our device. All that was said was that we
10:26 12 receive traffic, and we do, you know, things with that
10:26 13 traffic. There was no testimony about what the
10:26 14 processor module is.

10:26 15 There was also no testimony about what
10:26 16 the switching module is. And the only thing, by the
10:26 17 way, in the expert report that he could have said is
10:26 18 that the switching module is the link scheduler.
10:26 19 There's one, e.g., switching module. That's what -- he
10:26 20 could have said that. He didn't. He didn't say
10:26 21 anything.

10:26 22 And he certainly didn't say anything
10:26 23 about whatever he thinks the processing module is and
10:26 24 whatever he thinks the switching module is being
10:27 25 coupled together.

10:27 1 The only testimony that he gave that even
10:27 2 relates to those limitations was when counsel asked him
10:27 3 those leading questions and said, do you agree that
10:27 4 this limitation is met? Yes.

10:27 5 Do you agree that this limitation is met?
10:27 6 Yes.

10:27 7 Did you look at source code to confirm
10:27 8 that? Yes.

10:27 9 Did you look at documents? Yes.

10:27 10 And that's not testimony on which the
10:27 11 jury can base a conclusion of infringement.

10:27 12 So the other thing that I want to note
10:27 13 about that is these aren't just a couple of random
10:27 14 limitations.

10:27 15 As the Court is well aware, there was a
10:27 16 ex parte reexamination on this patent. Claim 1, which
10:27 17 is a method claim for doing the same thing, was
10:27 18 invalidated.

10:27 19 Claim 13 is an apparatus claim for doing
10:27 20 the same thing. It was held valid on the sole basis,
10:27 21 the examiner said, just because of these structural
10:27 22 limitations. They're not in the prior art.

10:27 23 So this is literally the only thing
10:27 24 holding this claim together. And the expert and WSOU
10:28 25 put on zero evidence of the only two limitations of

10:28 1 this structural claim.

10:28 2 So this is why I think we're in the rare.
10:28 3 And we understand the Court's practice is often to
10:28 4 reserve on these sorts of things. This is really one
10:28 5 of those cases where we ought not to be sending this
10:28 6 case to the jury. There's nothing for them to decide.
10:28 7 There's no evidence on which they could base a
10:28 8 conclusion of infringement.

10:28 9 The last point I want to make, Your
10:28 10 Honor, is on a different element of the claim. The
10:28 11 last element of the claim talks about processing the
10:28 12 packets such that packets that are destined for an
10:28 13 egress node that is congested or handled differently
10:28 14 with a different priority than packets that are sent to
10:28 15 a non-congested node.

10:28 16 Again, we looked really carefully at the
10:28 17 testimony last night because we have it so quickly.
10:28 18 And there was zero testimony other than, "yes. I think
10:28 19 that element is met," that showed how priorities are
10:29 20 changed.

10:29 21 The witness testified about how he
10:29 22 thought bandwidth was changed or that it is handled
10:29 23 differently, but never did he explain how the
10:29 24 priorities are changed. In fact, he testified that the
10:29 25 priority is set based on traffic type, which is exactly

10:29 1 how the product works.

10:29 2 But he never -- and look. If he had
10:29 3 said, but here's why I think that means changing the
10:29 4 priority, that's, you know, that's fine. He didn't.
10:29 5 He just didn't.

10:29 6 He -- and I understand that he was in a
10:29 7 difficult position because he hadn't offered those
10:29 8 opinions, but it's just not in the record.

10:29 9 And so, Your Honor, we move for judgment
10:29 10 under Rule 50(a) that there is no infringement. We
10:29 11 also have bases that are going to be addressed in the
10:29 12 papers, but I would really like just to focus on that
10:29 13 part.

10:29 14 THE COURT: And for the record, I think
10:29 15 it was raised through my law clerk, the issue that you
10:29 16 all -- the defendant has an issue on 101.

10:29 17 MR. ROSENTHAL: We do. You're right.

10:29 18 THE COURT: But on that, I'm going to
10:30 19 wait to decide that until -- setting aside what we're
10:30 20 going to do right now, I'm not going to take up the 101
10:30 21 right now. I'll take that up at the end of trial.

10:30 22 MR. ROSENTHAL: I figured as much. That
10:30 23 is in our papers. We also addressed -- just so you're
10:30 24 not surprised, we also addressed the standing because
10:30 25 our appellate folks believed that we ought to put that

11:27 1 between every endpoint, so it's collecting node
11:27 2 information.

11:27 3 And then he struck that -- that last part
11:27 4 of that answer was stricken as an objection by
11:27 5 Mr. Rosenthal, but I wanted to make sure the Court was
11:27 6 aware of that citation in the record as well.

11:27 7 THE COURT: Anything else, Mr. Rosenthal?

11:27 8 MR. ROSENTHAL: No, Your Honor.

11:28 9 (Off-the-record bench conference.)

11:28 10 THE COURT: The Court is going to grant
11:28 11 the motion for directed verdict.

11:28 12 The plaintiff will have an opportunity to
11:28 13 file a written response to the defendants' motion. You
11:28 14 all can do whatever normal back-and-forth pleading
11:28 15 there is, and then we will -- because we'll need to get
11:28 16 a written order up for it.

11:28 17 So that takes care of the case. I will
11:28 18 talk to the jury and let them know that we have
11:28 19 resolved the case.

11:28 20 And I thank you for being here.

11:28 21 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
7 District of Texas, do certify that the foregoing is a
8 correct transcript from the record of proceedings in
9 the above-entitled matter.

10 I certify that the transcript fees and
11 format comply with those prescribed by the Court and
12 Judicial Conference of the United States.

13 Certified to by me this 26th day of
14 February 2023.

15 /s/ Kristie M. Davis
16 KRISTIE M. DAVIS
17 Official Court Reporter
18 800 Franklin Avenue
19 Waco, Texas 76701
20 (254) 340-6114
21 kmdaviscsr@yahoo.com
22
23
24
25

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